APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-7148
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JULIUS CECIL OLSON,
RONALD EDWARD SMITH,
WILLIAM LARRY DAVID,
DAN FOWLER,

Defendants-Appellants.

Appeal from the United States District Court
for the
Middle District of Alabama

(February 19, 1982)

Before HILL, VANCE and HATCHETT,
Circuit Judges.

PER CURIAM:

This appeal requires the review of the trial court's application of fourth amendment warrant requirement principles, the sufficiency of the indictment, the admissibility of co-conspirator hearsay testimony, interim jury service procedures, the propriety of judicial and prosecutorial conduct, the tardy production of Brady materials, the admission of certain rebuttal testimony, the adequacy of supplemental jury instructions, and the sufficieny of the evidence. We affirm.

FACTS

In late 1979, Dan Fowler invited Sam Wylie to locate airstrips to facilitate a marijuana smuggling operation in exchange for "some easy money." Fowler subsequently in-

troduced Wylie to James Stephens, a pilot, and Wylie showed them various airstrips in the Opelika, Alabama area. In April 1980, Fowler, Wylie, and another person consummated a deal wherein Wylie was to receive $1,000 for each load of marijuana successfully flown in. According to Wylie, who testified as a government witness, he and Fowler had numerous discussions about the venture and several airplanes were flown into different airstrips. The plan to utilize Stephens as a pilot was frustrated when he died in a July, 1980, air crash. Fowler then introduced the other defendants -- Julius Olson, William David, and Ronald Smith -- to Wylie in September, 1980.

On October 15, 1980, Brenda Huey observed a twin-engine airplane land on the airstrip in front of her home and disappear behind a hangar. As Mrs. Huey peered around the hangar,

she observed two men hurriedly unloading cardboard boxes from the plane into the back of a pickup truck. She heard one say, "Hurry up! Hurry up! We have to get out of here." Aroused by her suspicions, Mrs. Huey telephoned Flim Wilson, her husband's business partner, who summoned Opelika police. Upon arriving at the airstrip, a police officer saw Olson and Wylie near the airplane with airplane seats on the ground. Olson headed towards a wooded area, but returned to the officer. The officer had the two men sit near the plane until back-up units arrived.

While en route to the Huey residence, Wilson observed a suspicious-looking person, later determined to be Olson, parked alone in an Oldsmobile on the side of the road about one mile from the Huey farm. Wilson recorded the license number of the car. Before reach-

ing the Huey farm, Wilson met Wylie, his employee, with two passengers in his pickup truck. After Wylie told Wilson that his friends had landed the plane, Wilson notified police to disregard his call. The police, however, received a third dispatch from Mrs. Huey.

A few minutes after Wilson arrived at the Huey farm, Wylie drove up. This time, however, he had only one passenger, whom Wilson identified as the person he had seen in the Oldsmobile prior to his meeting with Wylie (Olson). Wylie told Wilson that he had just picked Olson up at the Mariner Inn. Wilson, however, told police that Wylie had not had time to travel the distance to the inn and back since he had last seen him.

In speaking with police, Olson mentioned repossessing the airplane but refused to

elaborate when questioned further. The officer then observed what he believed to be marijuana on the top step of the airplane. He then entered the plane and found marijuana residue on the carpet. The keys to the plane were partially covered with dirt near Olson's feet.

The craft was flown from the Huey airstrip to the Auburn-Opelika Airport where it was processed for fingerprints and marijuana residue. Police arrested David and Smith there, seized Smith's car keys, and determined that the keys fit the Oldsmobile parked outside the airport.

Prior to trial, the court denied defendants' motions to suppress evidence obtained from the airplane and the Oldsmobile, but suppressed all evidence obtained from the persons of David and Smith and from a motel room. The

court ruled that the police obtained the evidence pursuant to an arrest without probable cause.

At trial, Wylie testified that Fowler organized the smuggling operation. To corroborate Wylie's testimony, the prosecution introduced records of numerous telephone calls between Wylie and Fowler during the period of the conspiracy as well as testimony from Wylie's girl friend that Fowler called Wylie on numerous occasions. Wylie also testified that David and Smith left on the first weekend in October in the plane seized in this case, but failed to return as scheduled. Wylie, Olson, and another person waited at the Camp Hill Airport until Fowler called to say that the plane had been delayed. According to Wylie, Smith and David successfully flew the airplane into the Huey airstrip on October 15.

He saw Smith and two others unload twenty-five to thirty boxes which he was told contained marijuana into a three-quarter ton pickup truck. The two unidentified men, known to Wylie only as D.L. and J.C., drove Wylie to his pickup and then drove away. Wylie then drove David and Smith to where Olson waited in his Oldsmobile. David and Smith left in Olson's car while Olson returned with Wiley to the Huey farm where they were apprehended.

A jury convicted Olson, David, Smith, and Fowler of conspiracy to import marijuana, 21 U.S.C. § 963 (1981), importation of marijuana, 21 U.S.C. §§ 952(a) and 960(a)(1) (1981), conspiracy to possess with intent to distribute marijuana, 21 U.S.C. § 846 (1981), and possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1)(1981). The court sentenced Fowler to a total of three years; Olson,

ten years; David, five years; and Smith, five years. This appeal followed.[1]

I. Warrantless Search

We need not consider Olson's contention that the warrantless search of the aircraft is not supportable by the plain view and search incident to arrest doctrines because other grounds existed upon which to justify the search. The search of an airplane, like that of other highly mobile instrumentalities, without a warrant but based on probable cause and exigent circumstances is an exception to the warrant requirement of the fourth amendment. Carroll v. United States, 267 U.S. 132 (1925); cf. United States v. McBee, 659 F.2d 1302, 1304 (5th Cir. 1981)(automobile exception). Probable cause to search exists when the facts and circumstances available to the officers would warrant a reasonably prudent

person to believe that the vehicle contains contraband. United States v. Ballard, 600 F. 2d 1115, 1119 (5th Cir. 1979); United States v. Clark, 559 F.2d 420, 424 (5th Cir.), cert. denied, 434 U.S. 969 (1977). In determining whether probable cause exists, we look to the totality of the circumstances and the inferences which flow therefrom as well as to the collective knowledge of the police officers, rather than to the sole knowledge of the searching officer. United States v. Ballard, 600 F.2d at 1119; United States v. Clark, 559 F.2d at 424.

In this case, several facts give rise to probable cause sufficient to justify the warrantless search of the aircraft. Police had learned from Mrs. Huey that she had seen men unloading boxes from an airplane and loading them onto a pickup truck. She had also heard

one of the men say, "Hurry up! Hurry up! We have to get out of here." Wiley was seen leaving the farm with two strangers, and shortly thereafter returning with a third (Olson), whom Wilson had observed parked about a mile from the Huey residence. Further, Wilson told police that it was not plausible that Wiley could have picked Olson up at the Mariner Inn and have returned to the Huey Farm in the time Wiley indicated. Upon arriving at the craft, an officer observed Olson start walking toward the woods and then return in his direction. Police later found the keys to the craft partially buried near Olson's feet.

The existence of probable cause, and the exigencies of the situation justified a search of the plane. The suspects who had loaded the boxes onto the pickup had fled and had not been apprehended or even identified. Any evi-

dence that would have been in the plane could have been easily removed. Thus, the immediate warrantless search was proper because it was impracticable to obtain a warrant since the craft could have been quickly moved out of the area. Carroll v. United States, 267 U.S. at 153; United States v. McBee, 659 F.2d 1305.

Because exigence is determined as of the time of the initial search and seizure, it is irrelevant that police had sufficient time to obtain a warrant before the second seizure and corresponding search of the plane at the Auburn-Opelika Airport. United States v. McBee, 659 F.2d at 1305 (citing United States v. Mitchell, 538 F.2d 1230, 1232 (5th Cir. 1976)(en banc), cert. denied, 430 U.S. 945 (1977)). The exigencies and probable cause which existed at the time of the seizure at the Huey airstrip thus legitimated the subse-

quent extensive search and collection of marijuana residue from the airplane after it was flown to the Auburn-Opelika Airport where it was processed for evidence. Chambers v. Maroney, 399 U.S. 42, 52 (1970). The aircraft was located in a remote area in the late afternoon. A determination had been made to fly the plane to the Auburn-Opelika Airport before dark where there would be adequate lighting and the airplane would be secure. Although law enforcement officers had seized the craft and had it under their control, the unknown whereabouts of the other suspects created the danger, however slight, that the craft or its contents may have been moved before police obtained a valid search warrant. This procedure was reasonable and satisfied the fourth amendment.

Appellant Smith also argues that the trial

court erred in denying his motion to suppress the evidence recovered from the Oldsmobile at the Auburn-Opelika Airport. The trial court suppressed all evidence discovered as a direct result of the illegal search of Smith and David at the Auburn-Opelika Airport. The court further found, however, that the car located at the airport and evidence found therein was uncovered through information derived independently of any evidence found as a direct result of an illegal search. Smith, however, argues that the warrantless seizure of the car and the seizure of the items therein pursuant to a search warrant were direct fruits of his illegal arrest and of the illegal seizure of his car keys. We reject this contention on the grounds that: (1) the discovery of the automobile had an independent source from the illegally seized keys, and (2) the

automobile would otherwise have been discovered through ordinary police investigation.

The exclusionary rule bars evidence obtained "as a direct result" of an illegal search or seizure. Wong Sun v. United States, 371 U.S. 471, 485 (1963); United States v. Brookins, 614 F.2d 1037, 1041 (1980). The exclusionary rule, however, is inapplicable to evidence obtained "by means sufficiently distinguisahble [from the illegal action] to be purged of the primary taint." Wong Sun v. United States, 371 U.S. at 487-88. The three oft-cited exceptions to the exclusionary rule occur where (1) the physical evidence or witness's testimony has an attenuated link to the illegally secured evidence, Nardone v. United States, 308 U.S. 338, 341 (1939); United States v. Cruz, 581 F.2d 535, 538 (5th Cir. 1978)(en banc); (2) where the derivative

evidence has an independent source from the illegally obtained objects. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); United States v. Houltin, 566 F. 2d 1027, 1031 (5th Cir.), cert. denied, 439 U.S. 826 (1978); and (3) where the derivative evidence would inevitably have been discovered during a police investigation absent the aid of the illegally obtained evidence. United States v. Brookins, 614 F.2d at 1042.

The circumstances indicate that the evidence used to locate the Oldsmobile came from a source independent of the illegally seized keys. It is undisputed that the officers had a specific description of the Oldsmobile viewed by Wilson as well as the car's tag number and that a look-out had been posted on the vehicle. This evidence constituted an independent source. United States v. McBee, 659 F.2d

at 1306; United States v. Houltin, 566 F.2d at 1031. Although the search warrant affidavit contained information regarding the illegal seizure of the keys from Smith, sufficient information in the affidavit remained to support the finding of probable cause. Therefore, the warrant was valid despite the recitation of the illegally seized evidence in the affidavit. Franks v. Delaware, 438 U.S. 154 (1978).

Similarly, the facts adduced by the prosecution indicated that police possessed and were actively pursuing leads that would have inevitably led to the discovery of the Oldsmobile and that a reasonable probability of subsequent discovery existed based on this showing and the record generally. Brookins, 614 F.2d at 1046-48. We hold that the automobile and the evidence found therein were

properly admitted under both the independent source and inevitable discovery exceptions.

II. Single versus Multiple Conspiracies

Olson argues that although the indictment charged a single conspiracy, the proof established two separate and distinct conspiracies, thus resulting in a fatal variance between the allegations and the proof. He argues that the evidence regarding the Wylie, Fowler, Stephens, and Jones conspiracy created a "spillover effect" causing a transference of guilt from these conspirators to the other defendants.

"Whether a scheme is one conspiracy or several is primarily a question for the jury." United States v. Michel, 588 F.2d 986, 995 (5th Cir.), cert. denied, 444 U.S. 825 (1979). "Personnel changes do not defeat a finding of

a single conspiracy." United States v. DeLeon, 641 F.2d 330, 334 (5th Cir. 1981); United States v. Ochoa, 609 F.2d 198, 201 (5th Cir. 1980). Rather, proof of overlapping membership in activities directed towards a common goal may reflect a single containuing conspiracy. United States v. DeLeon, 641 F.2d at 334; United States v. Tilton, 610 F.2d 302, 307 (5th Cir. 1980); United States v. Ochoa, 609 F.2d at 201.

From the evidence presented, we think that the jury reasonably could have found one conspiracy to import and distribute marijuana into the Opelika area by airplane. The evidence indicates that the conspiracy did not cease with Stephen's death, but continued when these defendants joined the conspiracy organized by Fowler. The numerous discussions between Fowler and Wylie, their presence at

meetings with Stephens, meetings with the other defendants to discuss the smuggling operation, and Wylie's presence near the aircraft evinced an overlapping membership in the various activities that reflect a single conspiracy. The fact of Stephens's death and the absence of David, Smith, and Olson from the meetings involving Fowler, Wylie and Stephens does not defeat the single conspiracy theory.

We hold that a change in the membership of the conspiracy does not mandate a finding of two separate conspiracies. Even if two conspiracies did exist, the variance between the proof at trial and the indictment will not constitute reversible error unless it affects the substantial rights of the accused. United States v. DeLeon, 641 F.2d at 336; United States v. Tilton, 610 F.2d at 307. We

find no prejudice due to the alleged variance in this case.

III. Co-conspirator Hearsay Statements

Olson argues that the court erred in admitting the hearsay conversations of Wylie, Fowler, and Stephens because these statements were not made in furtherance of the conspiracy charge as required by Fed.R.Evid. 801(d)(2)(E).[2]

We disagree. The conversations concerned the formation of future strategies and the elimination of obstacles to the scheme. "[B]ecause [the statements] set in motion transactions that were an integral part of the ... scheme," we hold that the trial court properly admitted the hearsay as in furtherance of the single continuing conspiracy in which appellants were members. United States v. Fielding, 645 F.2d 719, 726 (9th

Cir. 1981). Even if no independent proof of appellants' connection with the conspiracy existed at the time the court admitted the hearsay statements, the court protected appeallants from any prejudice by limiting the admissibility of each statement to defendant Fowler.

IV. Interim Jury Service

Olson, Smith and Fowler contend that the trial court committed reversible error in recessing the trial for five days during which period four jurors in the instant case heard a perjury prosecution tried by the government's attorney in this case. The transcript indicates that defense counsel was aware before the recess that the four jurors would be hearing the other case and that the same prosecutor would be involved. Nevertheless,

they did not object. Only the government objected to the recess, but for reasons favorable to its cause, rather than on the grounds advanced by appellants herein.[3] Appellants' failure to raise the propriety of the interim jury service at trial constitutes a waiver of this issue. United States v. Eldridge, 569 F.2d 319, 320 (5th Cir.), cert. denied, 436 U.S. 929 (1978).

V. Supplemental Voir Dire

Olson contends that to insure the impartiality of the jury, the trial court was constitutionally required to conduct a supplemental voir dire to determine whether the venire had been infected during the course of the perjury trial or by other outside influences during the interim recess. The defendants' failure to request a supplemental voir

dire or call the court's attention to this matter in any manner at trial waived the issue. United States v. Eldridge, 569 F.2d at 320. The cases upon which appellant relies do not require the trial court to conduct supplemental voir dire on its own motion where the defendant neglects to timely raise the issue of interim service. Moreover, even in the presence of an objection, an obligation to conduct supplemental voir dire arises only after a "significant" delay. See United States v. Price, 573 F.2d 356, 365 (5th Cir. 1978)(where defendant objected to interim service, trial court committed reversible error by failing to conduct supplemental voir dire after delays of forty-three and forty-nine days between jury selection and commencement of trial). The requisite delay is absent from this case.

VI. Judicial Interference

Olson contends that the trial court improperly injected itself into the trial to such an extent as to deny defendants a fair trial. Appellants complain that the court's references to appeal could readily be understood by the jury to mean that the court presumed that the defendants would be convicted and therefore appeal to this court. Of these remarks, we only find objectionable the court's statement "I can just imagine trying to send the record to New Orleans, and including that tank."

Although the jury could have interpreted this statement according to the meaning advanced by appellant, we hold that the comment does not constitute reversible error. This reference "occupied but a few seconds of a lengthy trial," and was made in the context of the court's ruling on procedural matters. We also believe that the jury understood the comment to mean

that counsel would pursue this matter with the court of appeals if his client was convicted and appealed. United States v. James, 510 F.2d 546, 550 (5th Cir.), cert. denied, 423 U.S. 855 (1975). Even if the trial court's comment may have influenced the jury, we believe that the instruction to disregard the statements of counsel and the court except for its charge as to the law overcame any possible prejudice. United States v. James, 510 F.2d at 550-51. The court's comments did not suggest that the jury's decision would not be final and that the ultimate decision rested with an appellate court. United States v. Day, 438 F.2d 121, 122 (5th Cir. 1971).

Olson also argues that the court commented on the accused's refusal to testify and thereby committed reversible error in the

following exchange with defense counsel:

Counsel: Your Honor, for the record, my client has asked me to inform the Court and the Jury that he is convinced that Mr. --

Prosecutor: We object, Your Honor.

The Court: No, I don't think we had better say that. You let your client testify, if you want to, about whatever you want to testify for him.

Defense Counsel: All right.

We hold that this did not constitute a comment on defendant's failure to testify, but rather reflected his right to take the stand and testify under oath if he so desired. Even if the court's admonition could be interpeted [sic] as a comment on appellant's failure to testify, we hold such error harmless. Cf. United States v. Lepiscopo, 429 F.2d 258, 260

(5th Cir.), cert. denied, 400 U.S. 948 (1970) (court's statement to pro se defendant not to make side comments to jury while cross-examining witness and that he would have opportunity to be sworn and testify if he so chose did not constitute comment on defendant's failure to testify).

We find appellant's other contentions regarding the court's alleged overinvolvement in conducting the trial to be without merit.

VII. Prosecutorial Comments

Smith complains that several prosecutorial comments were so prejudicial as to constitute plain error. During closing argument, the prosecutor stated that defendants "schemed to bring in thousands of pounds or more of marijuana ... to any child that would smoke it." After the court sustained objection and ad-

monished the prosecutor that no evidence existed that marijuana went to any child, the prosecutor resumed this line of argument by stating "And I don't care whether it was a man, woman, or a child. ... They said you can't believe Wiley when the lives and destinies of people are at stake. How about the lives and destinies of people who smoke the marijuana?" Again objection was sustained and the jury told that the laws were made by Congress and the jury was not to be concerned about the purpose of the law, but only with whether or not the law had been violated.

The attempt to discredit the appellants by alluding to the general problem of drug abuse in the community presents the danger of implicating the appellants in offenses other than those charged. The prompt objections and the court's immediate instructions, however,

prevent a finding that the improper suggestions of a drug problem in the populous and of the effect of narcotics on human lives invalidates these convictions. United States v. Leaman, 546 F.2d 148 (5th Cir.), cert. denied, 431 U.S. 917 (1977). While we admonish government counsel for injecting immaterial matters into the trial, we conclude that the comments did not irreparably affect the jury's deliberations so as to prejudice substantial rights of the appellants. United States v. Leaman, 546 F.2d at 151.

We hold that the prejudicial effect of other prosecutorial statements complained of constituted no more than harmless error. United States v. Corbo, 555 F.2d 1279, 1282 (5th Cir.), cert. denied, 434 U.S. 928 (1977); United States v. Leaman, 546 F.2d at 151.

VIII. Brady Materials

Appellant Fowler contends that the United States violated the mandate of Brady v. Maryland, 373 U.S. 83 (1963), which holds that the suppression by the prosecution of material evidence favorable to an accused in the sense of mitigation, exculpation, or impeachment upon request violates due process. 373 U.S. at 87; Calley v. Callaway, 519 F.2d 184, 221 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976). Fowler argues that despite defendants' request to turn over evidence favorable to them, the government suppressed a tape recording of a statement made to police by Wiley, chief witness for the prosecution, and the only witness to testify about the alleged conspiracy.

The government turned over the tape recording to the defense at the conclusion of Wiley's testimony. Defense counsel thus were

able to review the tape for approximately one hour during lunch recess before cross-examination. The court also told defense counsel that it would afford them additional time if necessary. In view of the fact that defense counsel vigorously cross-examined Wiley in regard to discrepancies between his in-court testimony and his statement given to police, we hold that the delay in disclosure did not prejudice the appellants. United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979).

Fowler also contends that the accidental erasure of portions of the police dispatch tapes violated Brady because the tapes probably included exculpatory material. In assessing whether the nondisclosure of asserted Brady information comprised a constitutional violation, the nondisclosed evidence "must be

'crucial, critical, highly significant ....'" Calley v. Callaway, 519 F.2d at 221 (citing Luna v. Beto, 395 F.2d 35, 41 (5th Cir. 1968) (Brown, C.J. concurring, joined by a majority of the court)). As the court stated in Calley:

> [W]hen Brady is invoked to obtain information not favorable on the issue of guilt or innocence but useful for attacking the credibility of a prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for the nondisclosure to require reversal.

Calley v. Callaway, 519 F.2d at 222 (emphasis added). Appellant's speculative contentions are insufficient to bring the asserted evidence within the above cited rules to establish a violation of Brady.

IX. Rebuttal Witness

After the defense rested, the court permitted the government to reopen its case and

to introduce evidence under the guise of rebuttal. The government introduced the testimony of a Jamaican law enforcement officer to support Wiley's testimony that the plane had been in Jamaica and to rebut defense counsel's inference on cross-examination that Wiley had no personal knowledge concerning where the plane had been. David contends that the court erred in permitting this testimony because the Jamaican was not called to rebut testimony the defense had elicited, but rather to bolster the testimony of a government witness. Further, David argues that the Jamaican's testimony embraced new issues and that the appellants did not have an opportunity to explain his testimony.

Generally, it is within the sound discretion of the trial court to reopen a criminal case after both sides have rested to pre-

sent either omitted evidence or additional testimony. United States v. Wilcox, 450 F.2d 1131, 1143 (5th Cir. 1971), cert. denied, 405 U.S. 917 (1972). The record indicated that the government first learned of the Jamaican officer's identity after the first recess in the trial, but was unable to bring the witness into court until after the second recess and after the government had rested its case. Thus, the trial court did not abuse its discretion in permitting the prosecution to reopen its case because the omission was caused "through mere inadvertence." Dixon v. United States, 333 F.2d 348, 353 (5th Cir. 1964). Further, the officer's testimony concerning his observation of the plane in question in Jamaica and his in-court identification of appellants Smith and David as the plane's occupants did not raise new issues, but served

to clarify the extant issue of Wiley's personal knowledge that the plane had been held up in Jamaica and that David was the pilot.

X. Jury Instructions

Appellant David complains that the court's supplemental jury instruction constituted reversible error by failing to conform to the facts. The charge explained the concept of aiding and abetting through an example involving murder in the sale of a weapon. David argues that the murder example was extremely prejudicial because the jury "would be bound to infer negative things about a defendant in a case where the judge relates murder and weapons to the case at hand."[4] As a preface to this charge the court also stated:

> [T]hese charges that I will recharge you on are to be considered in the

> light of all of the other charges that I have given you, and you should not overemphasize these charges nor should you assume that I believe either that Fowler or Olson is guilty or is not guilty of either one of those counts. I don't mean to imply that I think that they are or they are not, or that the government has failed to establish proper proof of that fact. All I am doing is stating the law to you. And if you have asked a particular question, and I seek to give you a particular answer, not with the idea of telling you what to do in your deliberations, but with the idea of telling you the law on the subject. [Emphasis added.]

In giving additional instructions in response to inquiries from the jury, the court should be careful to give a balanced charge. If the court

> [E]lects not to repeat the entire original charge, he should remind the jury of the burden and quantum of proof and presumption of innonence or remind them that all instructions must be considered as a whole or take other appropriate steps to avoid any possibility of prejudice to the defendant.

United States v. Sutherland, 428 F.2d 1152, 1158 (5th Cir. 1970), cert. denied, 409 U.S. 1078 (1972)(emphasis added).

We find that the disputed instruction clearly met the mandate of Sutherland. We further hold that because the issue of accomplice liability clearly was implicated in this case, appellant's contention that the instruction was irrelevant, one-sided, and without basis in the law was without merit.

Because the Jamaican officer never testified that the appellants had committed an illegal act in Jamaica, David also argues that the following instruction constituted prejudicial error:

> Now, Ladies and Gentlemen, then bear in mind that any illegal act committed by anybody flying an airplane in Jamaica is not evidence of any illegal act that we are concerned with in this case. And you should not imply that some illegal

> act was committed in Jamaica in regard to a traffic pattern of an aircraft, or whatever it may turn out to be, that anybody has imported marijuana.
>
> The purpose of this testimony is simply to let you have the testimony to the extent that it may bear on some of the issues in this case.

David posits that this instruction forced defense counsel to elicit on cross-examination of the officer that he took note of the plane because of a landing violation.

We find that the trial court did not abuse its discretion in giving the above charge because the facts were susceptible of the interpretation that, because the Jamaican officer approached the appellants, they had committed some illegal act. Thus, the instruction was meant to ensure that the jury did not find the appellants guilty of import-

ing marijuana because the officer approached them. The charge neither allowed the jury to convict appellants on a charge separate from those stated in the indictment nor reduced the government's burden of proof. United States v. Walker, 621 F.2d 163 (5th Cir. 1980), cert. denied, 68 L.Ed.2d 202 (1981). We therefore do not find the charge prejudicial.

XI. Sufficiency of the Evidence

Appellants Fowler, Smith, and David also challenge the sufficiency of the evidence on all four counts. The government presented Wiley's testimony to show each appellants' membership in the conspiracy to import and the conspiracy to possess as well as to prove the substantive counts of importation and possession. Appellants, however, contend that Wiley's testimony was not credible.

An appellate court may not assess the

credibility of witnesses; that function is relegated to the jury. United States v. Parker, 586 F.2d 422, 429 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979). Rather, the standard on appellate review as to sufficiency of the evidence requires us to inquire as to whether the jury could have reasonably found that the evidence was inconsistent with every reasonable hypothesis of innocence. United States v. Moreno, 649 F.2d 309, 312 (5th Cir. 1981). In applying the standards of review, we must consider the evidence and all reasonable inferences therefrom in the light most favorable to the government. Glasser v. United States, 315 U.S. 60 (1942). Evidence is thus sufficient to support a conviction when a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the appellant's

guilt beyond a reasonable doubt. United States v. Restrepo-Granda, 575 F.2d 524, 527 (5th Cir.), cert. denied, 439 U.S. 935 (1978).

After reviewing the evidence, we have determined that Wiley's testimony was substantial to support appellants' convictions on both conspiracy counts as well as on both substantive counts. The uncorroborated testimony of a co-conspirator is sufficient to support a conviction if the testimony is not incredible or unsubstantial on its face. United States v. Trevino, 565 F.2d 1317, 1319 (5th Cir.), cert. denied, 435 U.S. 971 (1978); United States v. Morgan, 562 F.2d 1001, 1003 (5th Cir. 1977), cert. denied, 434 U.S. 1050 (1978).

Defendants also contend that the approximately .15 gram of marijuana found on the airplane was insufficient evidence to support the

charge of possession with intent to distribute. United States v. Greyson, 625 F.2d 66, (5th Cir. 1980). Although Wiley admitted that he did not see the contents of the boxes, the large quantity of marijuana necessary to support the inference of possession with intent to distribute was established through the testimony of Wiley and Mrs. Huey regarding the twenty-five to thirty boxes being removed from the airplane and onto a pickup truck. Based upon his discussions with the other conspirators, Wiley was also aware of what the boxes were supposed to contain. Thus, we conclude that the jury was justified in finding beyond a reasonable doubt that the boxes contained marijuana and that the conspirators intended to distribute the marijuana.

CONCLUSION

For the reasons delineated above, we

hold that the trial court did not commit reversible error. Appellant's convictions are therefore affirmed.

AFFIRMED

FOOTNOTES

1. Smith, David, and Fowler adopt by reference all applicable issues and arguments raised by the other appellants in this consolidated appeal. Fed.R.App. P 28(i).

2. Fed.R.Evid. 801(d)(2)(E) provides, in pertinent part:

   A statement is not hearsay if -

   The statement is offered against a party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

3. The prosecution objected that the recess would extremely prejudice its case by forcing four jurors to hear a "completely different" case in the interim "and then expect them to come back and remember what they have heard here." The United States attorney added "[i]t is totally unfair to ... both sides, actually." Appellants, however, argue on appeal that the interim jury service may have affected the jurors' impartiality because the prosecutor's participation in both cases rendered the cases similar.

4. In response to the jury's request to explain the meaning of aiding and abetting the court stated, in pertinent part:

[T]he guilt of an accused in a criminal prosecution may - and I emphasize may because it is up to you to decide about it - may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that ordinarily anything a person can do for himself may also be accomplished by him through direction of another person as his agent or by acting in concert with or under the direction of another person or persons in a joint effort or enterprise.

Now I am going to give you an example. Let's assume that I am a murderer and want to murder somebody, but I don't want to bloody my hands or I don't want to take the chance that I might be caught. So what I did is hire somebody else to do it. And I pay somebody a thousand dollars to kill this person. Now, I haven't turned a hand to kill anybody. I abhor violence. I wouldn't do a thing like that, but I am a rascal enough to hire somebody else to do it. Under this law, I am just as guilty as the man that pulls the trigger or pushes the knife because the law provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures it commission is punishable as a principal....

....

Getting back to the murder situation: A man comes to me and he wants a pistol, and I have got a pistol, and I let him have my pistol. I don't know what he wants with it, and I think ... I have a right to assume he wants it for a legal purpose. And he takes that pistol and he goes and shoots somebody. Now, I would not be guilty of murder if I did not have reason to know that he wanted that pistol for an illegal purpose. But if I know that that man wants that pistol for an illegal purpose, then I am aiding and abetting him in doing the illegal act of murder, and I am as guilty as he is. Now, that is the law.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-7148
Non-Argument Calendar

D.C. Docket No. CR80-33-E

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JULIUS CECIL OLSON,
RONALD EDWARD SMITH,
WILLIAM LARRY DAVID,
DAN FOWLER,

Defendants-Appellants.

Appeal from the United States District Court
for the
Middle District of Alabama

Before HILL, VANCE and HATCHETT,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of the said District Court in this cause be, and the same are hereby affirmed.

February 19, 1982

ISSUED AS MANDATE: April 8, 1982, as to Olson, Smith and David

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-7148

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM LARRY DAVID,
DAN FOWLER, JULIUS CECIL OLSON,
and RONALD EDWARD SMITH,

Defendants-Appellants.

Appeal from the United States District Court
for the
Middle District of Alabama

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion February 19, 11 Cir., 1982, ___F.2d__).
(Mar 25 1982)

Before

PER CURIAM

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge